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ABSTRACT

This lesson presents an overview of the origin and procedure of the Independent Counsel Statute enacted in 1978 by the U.S. Congress. The lesson explains that the statute was drafted to eliminate the conflict of interest that might arise when the Department of Justice is ordered to investigate important government figures and that it gives the Attorney General the power to appoint an independent counsel when he or she determines that there is sufficient evidence to warrant the investigation of high-ranking government officials. Controversy over the statute and its powers has not been resolved; the lesson discusses several questions surrounding the controversy. Five student discussion questions are included and a class activity for small groups is provided. Web links for broadcast media sites, print media sites, E-zines, encyclopedias, legal sources, government sites, and other sources are offered. (BT)

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Web Lesson

The Role of the Independent Counsel

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The Role of the Independent Counsel

The independent counsel law was designed to assure the American people that high-placed government officials do not abuse the power of their positions. Yet many people believe that the independent counsel has, at times, abused its own power . In 1999, the Independent Counsel Statute will be up for review by Congress. Should this controversial law be renewed, modified, or allowed to expire?

The Watergate Affair

Shortly before the 1972 presidential election, a team of burglars broke into theWashington, D.C. headquarters of the Democratic Party, located in the Watergate Hotel. A sharp-eyed security guard called the police, who caught the intruders in the act. Investigators soon discovered that the suspects were connected to President Richard Nixon's reelection committee. The suspects were indicted and convicted of burglary and wiretapping. When one of the convicted burglars claimed that high-ranking government officials—including President Nixon—knew of the break-in, the incident erupted into a national scandal known as the Watergate Affair.

A special prosecutor, Archibald Cox, was appointed by John Mitchell, President Nixon's attorney general. Mitchell instructed the special prosecutor to investigate the Nixon administration's involvement in the Watergate break-in. When Cox requested copies of taped conversations about Watergate that had taken place between the President and his aides, President Nixon fired him.

Leon Jaworski, Cox's successor, did succeed in getting President Nixon's Watergate tapes. He obtained convictions of several high-ranking officials in the Nixon administration including Attorney General Mitchell.

Based upon the special prosecutor's investigation of the Watergate Affair, Congress drew up articles of impeachment against President Nixon. In order to avoid being impeached, President Nixon chose to resign. He was then pardoned by former Vice-President Gerald Ford, who had taken over the duties of President when Nixon resigned.

Before Watergate, the Department of Justice was responsible for investigating charges brought against high-ranking officials. As illustrated by the Watergate Affair, this arrangement sometimes raised complaints of conflict of interest. Many government officials had the power to dodge, divert, or obstruct any legal investigations that might threaten his or her position. For example, President Nixon used his authority over the U.S. attorney general's office to fire Archibald Cox, the man that Attorney General Mitchell had hired to investigate the Watergate Affair.

The Independent Counsel Statute

In 1978, largely in response to the Watergate Affair, Congress adopted a law that would address this problem. The Independent Counsel Statute was drafted to eliminate the conflict of interest that might arise when the Department of Justice is ordered to investigate important government figures. This law gives the U.S. attorney general the power to appoint an independent counsel when he or she determines that there is sufficient evidence to warrant the investigation of high-ranking government officials—including members of Congress. The independent counsel acts as a special prosecutor, providing any "substantial and credible information" that might constitute grounds for legal action against a public official.

As suggested by its name, the independent counsel law calls for few controls over the counsel's investigative powers. Once he or she is appointed, the independent counsel is not accountable to any government office and serves for as long as necessary to complete the investigation. Congress hoped that, by giving prosecutors broad-ranging investigative powers, they could assure Americans that their government had the power to control the behavior of its own leaders. The act expired in 1992, but a new independent counsel law was passed in 1994.

Since 1978, 20 independent counsels have spent roughly $200 million to investigate high-ranking government officials for everything from accusations of perjury to an inquiry into lies about the size of payments made by a cabinet member to a former mistress. Major independent counsel investigations have included the Iran-Contra arms sales of the Reagan Administration and the Clintons' involvement in a financially troubled Arkansas land development venture called "Whitewater."

The Whitewater investigation, conducted by special prosecutor Kenneth Starr, led indirectly to the investigation of President Clinton's allegedly illicit relationship with Monica Lewinsky, a White House intern. Starr's investigation has continued for more than four years and has cost approximately $45 million.

Since its adoption in 1978, the independent counsel law has come under intense scrutiny. Some observers believe the independent counsel law is necessary to oversee, or police, powerful government officials. Others believe that the law is problematic and should not be renewed after it expires in June, 1999. Still others believe that the independent counsel law is useful but should be modified.

Controversy over the independent counsel law focuses on four questions: Have independent counsel investigations suffered from the broad definition of their powers? Have independent counsel investigations become subject to partisan political rivalries? Can the independent counsel's broad powers contribute to a "witch hunt" mentality? Does the power of the independent counsel interfere with the impeachment process?

Broad Powers

The Independent Counsel Statute calls for a prosecutor to be appointed by a three-judge panel that is, in turn, chosen by the Chief Justice of the Supreme Court. No financial or time limits are placed on independent counsel investigations. In theory, the attorney general can discipline or even fire the independent counsel. Nevertheless, the political reality of an independent counsel investigation makes control by an attorney general or the U.S. Justice Department nearly impossible. For example, if Attorney General Janet Reno had tried to limit independent prosecutor Kenneth Starr's investigation of President Clinton, she would have been accused of conflict of interest. After all, President Clinton is her boss.

Some critics claim that the broad powers granted to independent counsels allow prosecutors to overstep the bounds of their investigations. "There ought to be some way to limit the ability of an independent counsel to expand his or her investigation. . ." said James McKay, who investigated a former Reagan aide charged with violating Congressional lobbying laws. "When you think of how the Starr investigations started with Whitewater and. . . what's become of it, it just seems that there should be some way to have prevented that from occurring."

Others believe that the broad definitions of the independent counsel law allows prosecutors to carry out a primary rule of criminal investigation: to follow the legal trail wherever it leads. Daniel Troy, who served in the Department of Justice during the Reagan and Bush Administrations, wrote, "If the evidence suggests that President Clinton has violated criminal laws, [independent counsel] Ken Starr is duty bound to undertake his own independent inquiry to assess the constitutionality of indicting the President." Sam Dash, a law professor at Georgetown University who was chief counsel in the Senate investigation of the Watergate Affair and Kenneth Starr's ethics advisor, maintained that "[the independent counsel]'s got this mandate, and he's got to investigate what he was appointed to investigate." In this instance, the independent prosecutor is simply doing his job.

Political Rivalry

Some critics believe that the territory covered by the independent counsel law—the investigation of highly placed public officials—creates opportunities for political rivals to inflict damage on each other. They argue that the original intention of the statute was to assure the American people that government officials were operating within the law, not to allow politicians to take "pot-shots" at their opponents. Former independent counsel prosecutor James McCay claims that "the 'ins' [the party in power] hate it and the 'outs' love it just for the purpose of bringing the 'ins' down."

Critics point to separate instances where both Democrats and Republicans have been accused of using independent counsel investigations to make their political rivals look bad. For example, Republicans objected strongly to Lawrence Walsh's eight-year, $60 million investigation of the Reagan Administration during the Iran-Contra scandal, while Democrats have been equally critical of Kenneth Starr's four-year, $45 million-dollar investigation of President Clinton.

Witch Hunts

Does the independent counsel law create a "witch-hunt" environment? Some critics believe that the law allows investigators to ignore many of the checks and balances on criminal and civil procedure guaranteed by the U.S. Constitution and the Bill of Rights.

In 1988, the Supreme Court had an opportunity to review this charge when it heard arguments in the case of Morrison v. Olson. This case challenged the constitutionality of the independent counsel law. The challenge arose when the House Judiciary Committee began an investigation into claims that the Environmental Protection Agency (EPA) withheld information and gave false testimony during an investigation of the EPA by the U.S. House of Representatives. An independent counsel was appointed, but members of the EPA filed a suit to stop the investigation, claiming that the independent counsel law was unconstitutional.

In Morrison v. Olson, the Supreme Court upheld the validity of the independent counsel law. It ruled that the independent counsel law does have sufficient checks and balances. The independent counsel is accountable to the attorney general, the court reasoned; it is largely restricted to investigative chores and is temporary. The court also found that the independent counsel law does not violate separation of powers, primarily because it does not interfere with the President's duties, nor does it give undue power to the legislature.

Supreme Court Justice Antonin Scalia disagreed with the majority, claiming that the law interfered with the separation of the executive, legislative, and judicial branches of government, which, Scalia maintains, is "the absolutely central guarantee of a just government."

In addition, Scalia argued, prosecutors normally investigate a crime to determine who did it. In contrast, said Scalia, independent counsels are appointed to investigate an individual to determine what crimes they committed. Scalia believes this process can undermine the individual's constitutional right to be presumed innocent until proven guilty.

Justice Scalia also joins several legal scholars who are concerned that political pressure and public scrutiny can force an independent counsel to produce results that justify the time and money they spent during their investigations. Irvin Nathan, a Washington lawyer who examined the independent counsel law for the American Bar Association found that when prosecutors stayed on a case too long, they tended to develop "a vested interest in prosecuting to vindicate what they've been doing for two or three years." This vested interest, critics claim, can lead to "witch hunt" tactics such as the violation of citizens' rights to due process and other rights as described in the 5th and 6th amendments to the Constitution.

Impeachment and the Independent Counsel

Recently, an intense controversy regarding the independent counsel law has focused on Kenneth Starr's investigation of President Clinton. In his report to Congress, Starr declared that "there is substantial and credible information that President Clinton committed acts that may constitute

grounds for an impeachment." Starr appeared before the House Judiciary Committee to testify about the findings of his investigation.

Sam Dash, Starr's ethics advisor, supported the independent counsel's legal strategies until Starr testified before the House Judiciary Committee. Dash immediately resigned and wrote Starr a letter. "You have violated your obligations under the independent counsel law," he wrote, "and have unlawfully intruded on the power of impeachment, which the Constitution gives solely to the House."

Starr responded to Dash's letter by explaining that his testimony was not an argument for impeachment but a "general status report on the state of the overall investigation." This controversy, whether Starr overstepped the boundaries of his office, bowed to the pressure of partisan politics, or violated constitutional law by making impeachment recommendations to Congress, raises further questions about the Independent Counsel Statute.

The framers of the Constitution believed that "high crimes and misdemeanors," the grounds for impeachment, were political offenses that threatened the constitutional structures of the U.S. government. They also declared that, in the impeachment process, Congress must determine what are impeachable offenses.

Julie O'Sullivan, a former prosecutor in the Whitewater investigation, believes that the independent counsel law threatens the impeachment process as defined in the Constitution. By allowing a special prosecutor like Kenneth Starr to decide which crimes rise to the level of impeachable offenses, O'Sullivan argues, the House of Representatives relinquishes its power and responsibility in the impeachment process. O'Sullivan argues that the broadly framed independent counsel law allows Starr to operate outside the checks and balances on impeachment that are written into the U.S. Constitution.

According to Joseph Story, a 19th century Supreme Court justice, a criminal act does not rise to an impeachable offense unless it is "committed by public men in violation of their public trust and duties." Legal analyst Jeffrey Rosen argues that "purely self-protective lies about a sexual dalliance in a civil case can't be considered a violation of Clinton's public duties." The focus on alleged criminal activity that has no direct connection to President Clinton's official duties was precisely the vision that the Constitution's framers rejected, says O'Sullivan.

Others believe that the independent counsel law does not violate Congressional authority in the matter of impeachment. They point to the impeachment process as defined by the U.S. Constitution. First, the House Judiciary Committee considers evidence presented in the independent counsel report. After the Judiciary Committee looks at the validity of the information in the independent counsel report, they prepare articles of impeachment—individual indictments arising from the evidence presented to them. Next, the entire House of Representatives must approve each article by a majority vote. The Senate then holds a trial on the articles of impeachment as approved by the House. The entire Senate acts as a jury, with the Chief Justice of the Supreme Court acting as judge. "And no person shall be convicted without the concurrence of two-thirds of the [Senate] members present," reads the Constitution. This

process, say the law's defenders, guarantees that any information presented by the independent counsel is thoroughly deliberated by Congress before the impeachment process can be completed.

Future Prospects

The independent counsel law may be susceptible to an abuse of power, it may play host to partisan political battles, and it may violate the constitutional rights of individuals and invade the separation of governmental powers. It may interfere with the impeachment process as defined by the Constitution. But the independent counsel law was created for an important purpose: to ensure that officials in high places do not operate beyond the rule of law.

In June 1999, the Independent Counsel Act will be up for review by the House of Representatives and the Senate. Should the independent counsel law be renewed? Should it be allowed to expire? Or should the independent counsel law be modified to make it more just and effective?

Alexia Morrison, who investigated charges against an assistant attorney general in the Reagan administration, said that "there has been a very successful campaign to lay faults at the foot of the [independent counsel] statute when in fact it is conduct that got us here." Although Morrison's 30-month, $1.5 million investigation produced no convictions in a disputed toxic waste cleanup, she believes the investigation was important because it helped dispel public suspicions that governmental wrongdoing would be covered up.

Former Whitewater investigator Robert Fiske Jr. believes that critics should consider what would happen in the absence of an independent counsel law. Fiske maintains that "the problem [occurs] when the case isn't brought" to public attention. The independent counsel law helps ensure that high officials are charged and brought to trial, regardless of the outcome.

Joseph DeGenova, who investigated the abuse of passport files by Bush administration officials, pointed to Nixon's firing of prosecutor Archibald Cox, an event that helped prompt the drafting of the independent counsel law.

> "Today, there's no way that a sitting president can possibly prevent his own investigation by firing anybody," DeGenova said, "because [the independent counsel law] will not permit it."

Stanford University law scholar Kathleen Sullivan maintains that we don't need the independent counsel law. Instead, she says, we should trust the system of checks and balances that are already built into the Constitution. "The greater the abuse," she says, "and the closer it is to the executive, the more the pressure of impeachment does its job."

Harvard University law professor Archibald Cox, whose 1973 dismissal by Richard Nixon as special prosecutor in the Watergate affair stimulated the drafting of the independent counsel law,

said, "we need a continuation of the statute, but I favor a narrowing of it." Cox would set time limits for independent counsel investigations, place a ceiling on investigative budgets, and narrow the range of officials who are subject to special investigations.

Independent counsel Donald Smaltz, who conducted a four-year, $20 million investigation of President Clinton's former Agriculture Secretary Mike Espy, was clearly disappointed when Espy was cleared of all 30 charges of corruption raised by Smaltz's office. Nevertheless, Smaltz said, "If the investigation. . . by our office dissuades corporations from giving gifts to their regulators—or the regulators from accepting gifts from those who are regulated—I believe the costs we have incurred and the efforts we have expended are worth the price."

Smaltz believes the independent counsel law should be allowed to lapse. He suggests that the responsibility for prosecuting the executive branch, Congress, and the judiciary should be given to a special Justice Department office regulated by the U.S. Senate.

For Discussion

1. What was the Watergate Affair?

2. How did the Watergate Affair lead to an independent counsel law?

3. Why did Supreme Court Justice Scalia oppose the independent counsel law?

4. Name several reasons why critics believe that the independent counsel law should be allowed to expire.

5. What are some reasons for keeping the independent counsel law?

ACTIVITY

Deciding the fate of the independent counsel law

Step 1: Divide the class into groups of five. Inform students that each group is going to role play a congressional judiciary committee. The job of the committee is to prepare a report that makes a recommendation to 1) renew or 2) let the independent counsel law expire, or 3) modify the independent counsel law to address some of the issues raised in the reading above.

Step 2: Ask each group to choose a chairperson who will lead the discussion, a recorder to take notes and lead preparation of the report, and a reporter who presents the group's findings to the class. Tell students to use the reading to help them make their decision. Each group should be able to explain the reasons for their recommendation.

Step 3: Debrief the activity by asking: What decision did you make? How did you reach your decision? If groups chose to change the independent counsel law, have the reporter describe their changes and their reasons for changing it.

Impeachment Links

Broadcast Media

ABC "A President in Crisis" http://abcnews.go.com/sections/us/underinvestigation4/index.html

CBS "Whitehouse Under Fire" http://www.cbs.com/prd1/now/template.display?p_section=825

CNN "Investigating the President"
http://www.cnn.com/ALLPOLITICS/resources/1998/lewinsky/

Court TV "Clinton in Crisis" http://www.courttv.com/casefiles/clintoncrisis/

C-SPAN "Investigation of the President" http://www.c-span.org/guide/executive/investigation/

Fox "Investigating Clinton" http://www.foxnews.com/news/packages/president/index.sml

MSNBC "The Clinton Crisis" http://www.msnbc.com/news/clintonunderfire_front.asp

PBS "Starr Investigation" http://www.pbs.org/newshour/bb/white_house/starr_archive.html

Print Media

Christian Science Monitor "President Clinton: A Time for Reckoning"
http://www.csmonitor.com/reckoning/index.shtml

Los Angeles Times "Clinton Under Fire"
http://www.latimes.com/HOME/NEWS/REPORTS/SCANDAL/.

New York Times "The President Under Fire"
http://www.nytimes.com/auth/login?Tag=/&URI=/library/politics/clintonlewinsky-index.html

USA Today "The Starr Report" http://www.usatoday.com/news/special/starr/starrix.htm

Washington Post "Clinton Accused"
http://www.washingtonpost.com/wp-srv/politics/special/clinton/clinton.htm

E-zines

Intellectual Capital.com "Clinton/Starr Files"
http://www.intellectualcapital.com/politics/clinton_starr/

Salon Magazine "The Clinton Crisis" http://www.salonmagazine.com/news/1998/01/23list.html

Encyclopedias

Grolier Online "Impeachment" http://www.grolier.com/presidents/ea/side/impeach.html

Legal Sources

Guide to Impeachment and Censure Materials Online http://jurist.law.pitt.edu/impeach.htm
JURIST: The Law Professors' Network recommends resources under these categories: Impeachment Primers, Constitutional and Statutory Provisions on Impeachment, Impeachments in History, Impeachment Procedures, Cases on Impeachment, Censure, Clinton Controversy, and Academic Opinion.

Legal Information Institute "Backgrounder on Impeachment"
http://www.law.cornell.edu/background/impeach/impeach.htm
From the Law School at Cornell University.

A Brief Guide to Impeachment http://www.law.lmu.edu/manheim/cl1/impeach.htm
From Professor Karl Mannheim, Loyola Law School, Los Angeles.

FAQs and Web Resources on the Impeachment Process
http://www.abanet.org/publiced/impeachment.html
From the American Bar Association.

Government

Whitehouse Memorandum Regarding Standards for Impeachment
http://www.whitehouse.gov/WH/New/html/clinton10-2b.html

House Judiciary Committee Impeachment Inquiry
http://www.house.gov/judiciary/icreport.htm

Constitutional Grounds for Presidential Impeachment
http://www.house.gov/lofgren/watergatereport.html

The 1974 report by the staff of the House Judiciary Committee, which examined the history, grounds, and proper uses of impeachment prior to the committee's hearing on the Nixon impeachment.

Other Sources

Policy.com "Congress Considers Impeachment" http://www.policy.com/reports/clinton_starr/

The Presidency A to Z "Impeachment" http://books.cq.com/freeResources/impcopy.htm

Northern Light "The Starr Report" http://special.northernlight.com/starr/

Andrew Johnson

Andrew Johnson's Impeachment Ordeal
http://www.intellectualcapital.com/issues/98/0219/icsmart.asp
By Daniel Glover, associate editor of IntellectualCapital.com, an e-zine.

Andrew Johnson, Impeachment and President Clinton
http://www.nando.net/nt/special/loy0221.html
By Wesley Loy, a reporter for the News-Sentinel in Knoxville, Tenn.

Impeachment Trial of Andrew Johnson http://odur.let.rug.nl/~usa/B/spchase/chase05.htm
From a biography of Samuel Chase, the chief justice who presided over Johnson's trial in the Senate.

Finding Precedent: The Impeachment of Andrew Johnson
http://www.impeach-andrewjohnson.com/
HarpWeek presents excerpts from the Harper's Weekly coverage of the 1868 Johnson impeachment.

The Impeachment of Andrew Johnson http://crf-usa.org/impeachment1.html
By Constitutional Rights Foundation.

Richard Nixon

Watergate 25 http://www.washingtonpost.com/wp-srv/national/longterm/watergate/front.htm
The Washington Post's 25th anniversary site on Watergate.

The American Experience: Nixon http://www.pbs.org/plweb-cgi/fastweb?getdoc+pbsonline+pbsonline+41609+0+wAAA+impeachment%26%28impeachment%29%3Ahomepage%26%28impeachment%29%3Astation
PBS profile of the Nixon presidency

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